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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

v.

JOSEPH NIEROTKO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SOCIAL SECURITY BOARD

OPINIONS BELOW

The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 41) is reported in 149 F. 2d 273. The opinion of the Referee of the Social Security Board, which was adopted by the Appeals Council (R. 8), appears at R. 11–21.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1945 (R. 40). The petition for a writ of certiorari was filed on August 13, 1945, and was granted on October 8, 1945 (R. 48). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether "back pay" awarded pursuant to Section 10 (c) of the National Labor Relations Act constitutes "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account.

STATUTES AND REGULATION INVOLVED

The applicable portions of the statutes and regulation involved are set forth in Appendices A and B, *infra*, pp. 27–33.

STATEMENT

The basic facts are undisputed.[1] On August 9, 1939, pursuant to Section 10 (c) of the National Labor Relations Act (*infra*, p. 31), respondent, Nierotko, whom the National Labor Relations Board found to have been discharged by the Ford

[1] The court below stated that the Ford Motor Company was withholding 1% of the amount ordered paid to respondent as "back pay," for respondent's Social Security tax should he be successful in this suit. This seems at variance with the statement of respondent's counsel (R. 29) that there had been no such withholding in Nierotko's case.

Motor Company for union activity, was ordered reinstated with "back pay" (R. 1–2, 3, 11–12). The Company, on July 18, 1941, paid to respondent as "back pay" for the period February 2, 1937 to September 25, 1939, the lump sum of $3,501.32 (R. 1, 3, 12–13). On February 27, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board rejected respondent's request that the "back pay" be credited to his Old Age and Survivors Insurance Account, the Bureau ruling that "back pay" did not constitute "wages" within the meaning of the Social Security Act (R. 32–33). In accordance with Section 205 (c) (3) of the Social Security Act, respondent then appealed to a referee, who, after hearing, affirmed the Bureau's determination (R. 11–21). The Appeals Council of the Social Security Board affirmed the referee's decision (R. 8).

Thereafter, pursuant to Section 205 (g) of the Social Security Act, respondent instituted a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, to review the decision of the Board (R. 1–2). On August 4, 1944, the district court entered summary judgment in favor of the Board (R. 37). On appeal, the United States Circuit Court of Appeals for the Sixth Circuit reversed (R. 40–48), holding that "back pay" awarded by the Labor Board, under the National Labor Relations

Act, constituted "wages" under the Social Security Act.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that "back pay" awarded under the National Labor Relations Act constitutes "wages" within the meaning of the Social Security Act.

2. In seemingly holding that respondent is entitled to more than one "quarter of coverage," as defined by Section 209 (g) (2) of the Social Security Act (*infra*, p. 30), for the "back pay" received, although payment of the "back pay" was made in a lump sum during a single "calendar quarter."

3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

Section 209 (a) of the Social Security Act defines "wages," for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b), in turn, defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed." Since "back pay" is not received for "service performed," it does not come within the statutory definition. Furthermore, to allo-

cate "back pay" over the period for which it was awarded, as would be necessary if the employee were to be put in exactly the same position as if he never had been wrongfully discharged, would contravene the provision in the Social Security Act that employees be regarded as having as quarters of coverage only those quarters "in which" they have received more than $50 in "wages." This has been the consistent interpretation by the Social Security Board and the Bureau of Internal Revenue, the bodies entrusted with the administration of the Social Security Act. Judicial decisions characterizing "back pay" under the National Labor Relations Act also support the conclusion that it is not awarded for service rendered. The general purposes of the Social Security Act and the Labor Relations Act would probably be furthered if "back pay" were held to constitute "wages" for Social Security purposes. But we are forced to the conclusion that there was no sufficiently clear manifestation of legislative purpose on this particular problem to warrant disregard of the ordinary meaning of the language of the statute.

ARGUMENT

We asked for certiorari in the instant case primarily because of the public importance of the question involved and the desirability of obtaining an authoritative ruling by this Court. We recognize the desirability from a broad social aspect of

a result that will tend to increase the Old Age and Survivors Insurance benefits to industrial workers who, because of long lay-offs resulting from unfair labor practices of their employers, might otherwise fail to qualify for certain benefits under the Social Security Act (Pet. pp. 9–10). It is our belief, however, that the statutory scheme of the Social Security Act fails to provide for the crediting of "back pay" awarded under the National Labor Relations Act as "wages" and that the matter of achieving the results desired is solely for Congress.

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[2] As we pointed out in our petition (pp. 10–11) almost 40,000 individuals have been awarded "back pay." It is reasonable to assume that practically all of these individuals are in occupations otherwise subject to the Social Security Act. "Wages" constitute the medium of determining both coverage and the amount of benefit payments. In order to be a fully insured individual at the age of 65 or at his death, that individual must have had "not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one" or "at least forty quarters of coverage." § 209 (g), *infra*, p. 30. A quarter of coverage is a calendar quarter within which the individual has received not less than $50 in "wages." *Ibid.* The primary insurance benefit (§ 209 (e)) is calculated by taking 40% of an individual's average monthly wage up to $50 and 10% of the remaining amount up to $250, plus an amount equal to 1% of the foregoing amount multiplied by the number of years in which $200 or more in "wages" were paid to such individual. Instances are occurring where an individual fails to qualify for primary insurance benefits as a fully insured individual because of the lack of as little as one or two quarters of coverage. The importance to such individuals of having "back pay" treated as "wages" is clear.

THE SOCIAL SECURITY BOARD PROPERLY RULED THAT "BACK PAY" AWARDED UNDER THE NATIONAL LABOR RELATIONS ACT IS NOT "WAGES" WITHIN THE MEANING OF THE SOCIAL SECURITY ACT

I. THE LANGUAGE OF THE ACT.

A. DEFINITION OF "WAGES"

An individual's rights to benefits under the Social Security Act are defined basically in terms of his employment and "wages."[3] Section 209 (a) of the Social Security Act (*infra*, p. 27) defines "wages," for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b) (*infra*, pp. 27–29), in turn, defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed."[4] The Social Security Board,

[3] "Wages" are of fourfold significance in the Old Age and Survivors Insurance Program, for they affect: (1) eligibility for benefits (Secs. 202 (a), 209 (g), 209 (h); (2) the amount of benefits payable (Sec. 209 (e) and (f)); (3) the amount of taxes to be paid to support the program (26 U. S. C. 1400, 1410); and (4) the amount of benefits to be withheld from those individuals thought not to be in need of benefits (Sec. 203 (d) (1)).

[4] The identical definition is contained in the correlative taxing provisions of the Act found in Titles VIII and IX of the original Act, which related to Old Age Benefits and unemployment compensation, respectively, and later incorporated into the Internal Revenue Code as Chapter 9, Sub-Chapter A (53 Stat. 175). The taxing provisions for the Old Age and Survivors Insurance program were given the name "Federal Insurance Contributions Act" by Sec. 607 of the Social Security Act Amendments of 1939, 53 Stat. 1387.

taking the same position as that adopted earlier by the Internal Revenue Bureau under the taxing provisions of the Act, held that "back pay" awarded under the National Labor Relations Act was not "wages" within the meaning of the Old Age and Survivors Insurance provisions of the Act (R. 32–33).

The Board's ruling clearly was required by the letter of the statute. If the term "wages" were undefined in the Act, it might well be given its dictionary meaning (R. 43–44) and include "back pay." However, the Act expressly defines "wages," and "in such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *National Homeopathic Hospital Association of D. C.* v. *Britton*, 147 F. 2d 561 (App. D. C.), certiorari denied May 7, 1945, No. 1124, October Term, 1944.[5] Congress has defined "wages" as "remuneration for service performed." And since respondent did not actually perform any service for the Ford Motor Company during the "back

[5] See also: *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 48; *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F. 2d 166, 170 (C. C. A. 8); *Von Weise* v. *Commissioner of Internal Revenue*, 69 F. 2d 439, 441 (C. C. A. 8), certiorari denied, 292 U. S. 655; *Suspine* v. *Compania Transatlantica Centroamericana*, 37 F. Supp. 268, 271 (S. D. N. Y.).

pay" period, the "back pay" which he received could not properly be classified as "wages."

The court below, seeking to find compliance with the requirement for "service," stressed (R. 44) the Social Security Board's recognition of vacation pay, sick pay, and disability pay as "wages."* But, manifestly in all such cases, the payments are voluntary and made in consideration of past or anticipated services, conditions clearly absent in the case of "back pay." Indeed, "back pay" may even be awarded to a person who has never actually been in the employ of the employer. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177; *Labor Board;* v. *Waumbec Mills,* 114 F. 2d 226 (C. C. A. 1). See Section 2 (3) of the Labor Act, Appendix A, *infra,* pp. 30–31.

Nor is the suggestion of the court below (R. 46) that the statutory requirement of "service" "might well be fortuitous", persuasive. We know of nothing in the Act or its legislative history to support this view. The phrase "service performed" appears no less than twenty-five times in the definition of "employment" (see Sec. 209 (b), Appendix A, *infra,* pp. 27–29) and is repeatedly employed in the legislative history of the Act. H. Rep. No. 615 (74th Cong. 1st Sess.) p. 21; S. Rep. No. 628 (74th Cong. 1st Sess.) pp. 33, 44; H. Rep. No. 728 (76th Cong. 1st Sess.) pp. 45–49; S. Rep. No. 734 (76th Cong. 1st Sess.) pp. 55–59.

* Regulation No. 3, Federal Old Age and Survivors Insurance under Title II of the Social Security Act, Sec. 403.827.

Moreover, both the House and Senate Committees reporting on the bill pointed out that "the benefits to be paid are related to the wages *earned*" and spoke of "wages" as being "payments made to the employee for *work done*."[7] H. Rep. No. 615 (74th Cong. 1st Sess.) pp. 6, 21, 32; S. Rep. No. 628 (74th Cong. 1st Sess.) pp. 7, 32. In these circumstances, it is apparent that the requirement of "service" appears in the Act by design and not by accident and that since respondent did not render any services for the "back pay" awarded him, such pay cannot properly be classified as "wages" under the Act.[8]

B. DEFINITION OF "QUARTER OF COVERAGE"

The decision below not only disregards the "service" requirement in the definition of "wages", but seems to conflict with the provisions of the Act defining a "quarter of coverage". To be "fully insured", the Act requires that the individual have a given number of "quarters of coverage", a "quarter of coverage" being defined as a "calendar quarter *in which* the individual has been paid not less than $50 in wages." (Sec. 209

[7] Unless otherwise indicated, all italics in this brief are supplied.

[8] The legislative history and definitions of the Social Security Act distinguish this case from *United States* v. *Local 807*, 315 U. S. 521, 531, 534–36, under the Anti-Racketeering Act, where an "attempt" to procure an employment status and wages therefor was held to be within the statutory exemption relating to payment of wages. The Court observed in that case that the "term 'wage'" is "susceptible of more than one meaning."

(g) (2); Appendix A, *infra*, p. 30.) Since the "back pay" in the instant case was all *paid in* a single calendar quarter, respondent would be entitled to only one quarter of coverage.[8a] Cf. *Morgan* v. *Social Security Board*, 45 F. Supp. 349, 352 (M. D. Pa.); *Emlen* v. *Social Security Board*, 148 F. 2d 927, 928 (C. C. A. 3). The decision below, however, would clearly seem to imply (R. 42–43) that the Board must credit respondent with multiple quarters of coverage, apportioning the "back pay" as if such pay had been currently received "wages."[8b]

Such an apportionment not only conflicts with the language of the Act, but with the intendment

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[8a] Strictly speaking, inasmuch as the back pay award in the instant case was for more than $3,000, and was made in the third calendar quarter for 1941 respondent would be entitled to two quarters of coverage. See p. 12, *infra*.

[8b] If the decision below does not require such an apportionment, it is internally inconsistent, for its fundamental premise is that an employee, by virtue of the Labor Act, has a right to be "made whole" in his Old Age and Survivors Insurance Benefit status. Respondent here will not be "made whole" unless his "back pay" is apportioned over the same number of quarters in which he would have been paid "wages," had he not been unlawfully discharged.

Even if "back pay" is apportioned over the "back pay" period, the employee is not assured of full restoration to his Old Age and Survivors Insurance Benefit status. Thus, where an unlawfully discharged employee realizes, during the "back pay" period, earnings from an employment exempted from the Social Security Act, the Board normally would order such earnings deducted from the amount of "back pay" to be awarded (see *Matter of The Grage Co.*, 7 N. L. R. B. 766, 777–778), and thereby *pro tanto* reduce the "wage" credits for social security purposes. (cont.)

of Congress as well. This is revealed in the legislative history of the last sentence of Section 209 (g) of the Act. That sentence provides that "In any case where an individual has been *paid in a calendar year* $3,000 or more in wages, each quarter of *such year* following his first quarter of coverage shall be deemed a quarter of coverage * * *." When this provision was introduced on the floor of the Senate by way of amendment, Senator Harrison, Chairman of the Committee reporting out the 1939 amendatory bill explained (84 Cong. Rec. 9008):

> Mr. HARRISON. Mr. President, the change from an annual to a quarterly basis for eligibility *requires that an individual be paid $50 in wages in a quarter for the quarter to be counted toward eligibility.* Wages is a defined term and does not include salary in a year after the first $3,000 is paid. Accordingly, an individual receiving $12,000 a year might, under the definition, have only one quarter of coverage in the year because all the part of his salary which could be counted as wages was *paid in* the first

(cont) In certain cases, "back pay" as "wages" would do more than make an employee whole in his social security status. Thus, where the employee receives earnings from other employment during the "back pay" period, the employee's transportation or other expenses incurred in securing such employment is deducted from such earnings to compute the employee's "net" earnings for that period (*Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 497–498), thereby causing the "back pay" awarded, plus the "wages" actually earned, to exceed the total "wages" the employee would have earned had he not been discharged.

> quarter. Under the amendment he would also have the succeeding three quarters in the year counted as quarters of coverage. * * *

Thus, with the exception of the $3,000 proviso, quarters of coverage clearly were understood to arise only from those quarters in which "wage" payments of $50 or more actually occurred.

Additional support for this view is present in other portions of the legislative materials. As originally enacted, Title IX of the Social Security Act allocated wage payments, not to the period in which they were paid, but to the period for which they were payable. (See § 901 of the Act of August 14, 1935, 49 Stat. 639.) The "attendant difficulties and confusion" in this method, placed a "burden on employers and the administrative authorities alike", and induced the Congress by the Social Security Act Amendments of 1939 (53 Stat. 1360) to change the basis of determining tax liability from "wages payable" to "wages paid" in a calendar year. H. Rep. No. 728 (76th Cong., 1st Sess.), p. 62; S. Rep. No. 734 (76th Cong., 1st Sess.), p. 75. Since it was the same amendatory Act that defined a "quarter of coverage" as a calendar quarter "in which" not less than fifty dollars in "wages" are "paid", it is likely that the words "in which" and "paid" were used advisedly. Where Congress wished wage payments to be allocated to periods other than the period in which they were actually paid, it knew

how to use appropriate language. Thus, the same amendatory Act defined a "currently insured" individual as one "with respect to whom it appears to the satisfaction of the Board that he has been paid wages of not less than $50 *for* each of not less than six of the twelve calendar quarters, immediately preceding the quarter in which he died". (Sec. 209 (h)). See Regulation No. 3, Federal Old Age and Survivors Insurance Benefits under Title II of the Social Security Act, Sec. 403.202.

From the foregoing, it is clear that Congress intended to confine quarters of coverage to those quarters in which wage payments of $50 or more actually occurred, regardless of when the services for such payments were rendered, and that apportionment of "back pay" over the entire "back pay" period would conflict with the express terms of the Act.[*]

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[*] Apportionment of "back pay" over the "back pay" period would also impose an administrative burden on the Social Security Board. Since "back pay" normally is only received long after the "back pay" period, there would be the initial problem of adjusting the Board's records for past years. Moreover, considerable difficulty would be presented in allocating "back pay" to particular calendar quarters, in those cases where the "back pay" had been reduced by the Labor Board to account for actual earnings from other employment, unjustifiable refusal to take new employment, or other factors. Again, in cases where the Board paid insurance benefits during the "back pay" period, the Board would be confronted with the problems of recouping, or adjusting the insured's account for, the amounts which the Board would have been authorized under Section 203 (d) (1) of the

2. THE ADMINISTRATIVE CONSTRUCTION OF THE ACT

In classifying "back pay" as "wages" under the Act, the court below refused to accord weight to the established and uniform administrative construction of the Act, on the ground that the interpretation was new and that Congress was too engrossed in implementing war efforts to amend or clarify the Act (R. 43).

The Board's interpretation of the Act is the same as that taken more than six years ago by the Bureau of Internal Revenue under the taxing provisions of the Act. (S. S. T. 359, 1939—1 Cum. Bull. 305; Appendix B, *infra*, pp. 32–33.) In its ruling, the Bureau stressed the fact that the employee performed no services, that the employer had done his best to terminate the employment relation, that the employee lacked any "right" to demand "back pay" from the employer, and that it is discretionary with the Board whether "back pay" shall be awarded. The Bureau then con-

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Act (Appendix A, *infra*, p. 27) to deduct from such benefits had the "wages" been currently received.

The court below was mistaken in declaring (R. 43) that the Board makes an apportionment with respect to wage awards under the Fair Labor Standards Act. There is set forth in Appendix C, *infra*, p. 34–36, a letter from the General Counsel of the Federal Security Agency in which he states that the administrative practice of the Social Security Board is to consider payment of such awards under the Fair Labor Standards Act as "wages" at the time they are actually paid by the employer and not to credit them as "wages" for the periods in which the services were performed.

cluded that the amounts paid were "on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services." The consistent administrative practice of the Social Security Board has been the same.[10] In conformity with the rulings of the Internal Revenue Bureau, the Labor Board has held that there need be no withholding from "back pay" of social security taxes which finance the Old Age and Survivors Insurance Program. *Matter of Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 55–56.[11] Cf. Brief for Labor Board, pp. 18–20, *Marshall Field & Co.* v. *Labor Board*, No. 453, October Term, 1942.

We submit that this uniform and established administrative interpretation of the Act "by those who are experts in the field and specially informed as to administrative needs and conveniences" (*Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 46) is entitled to

[10] The Social Security Board, on March 27, 1942, by a minute entry, specifically approved the practice. The Bureau has also ruled that payment of liquidated damages under § 16 (b) of the Fair Labor Standards Act (52 Stat. 1069, 29 U. S. C. 216 (b)) is not "wages" within the meaning of the Social Security Act (S. S. T. 393, 1940—1 Cum. Bull., p. 213). The Social Security Board has taken a like view (1941 Social Security Yearbook, p. 74).

[11] Cf. also 22 Comp. Gen. 349 in which the Comptroller General ruled that a "back pay" settlement before entry of a Labor Board order was not a reimbursable item of cost under a cost-plus-a-fixed-fee contract.

great weight in determining the meaning of the Act. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140.[12] Cf. *Better Business Bureau* v. *United States*, No. 52, this Term, decided November 13, 1945. This is especially true here, for the uniform administrative construction of the Social Security Act has not only resulted in settling the practice of the Social Security Board and the Internal Revenue Bureau under the Old Age and Survivors Insurance Benefit Program, but has been of considerable influence in the administrative construction of the various state unemployment compensation acts. Virtually all of these Acts define "wages" in terms of "remuneration" for "personal services," (see C. C. H. Unemployment Insurance Service, State Series, Sec. 1201), and the great preponderance of the states (some of them expressly referring to the ruling of the Internal Revenue Bureau) have ruled that "back pay" does not constitute "wages" since no services are actually performed by the

[12] Indeed it may be that the decision of the Social Security Board in the instant case should be treated as conclusive since it clearly has warrant in the record and a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *Gray* v. *Powell*, 314 U. S. 402; *Walker* v. *Altmeyer*, 137 F. 2d 531 (C. C. A. 2); *Social Security Board* v. *Warren*, 142 F. 2d 974 (C. C. A. 8); *Social Security Board* v. *LaLone*, decided October 25, 1945 (C. C. A. 9). But cf. *Trust of Bingham* v. *Commissioner*, 1944 Term, No. 932, decided June 4, 1945.

individual during the "back pay" period.[13] In this context, a holding by this Court that "back pay" does not constitute "wages" within the meaning of the Social Security Act would undoubtedly have a serious unsettling effect upon the administration of the state unemployment compensation acts.

3. THE NATURE OF A "BACK PAY" ORDER

The position taken by the Social Security Board and the Internal Revenue Bureau is also in harmony with the judicial authorities delineating the nature of "back pay" under the National Labor Relations Act. "Back pay" is neither remuneration for service performed, nor, as the court below assumed, a remedy for invasion of a right vested in the employee. The decisions of the courts reveal that "back pay" is awarded as an incident to the protection of a public right—the "right to have the channels of interstate commerce freed from obstructions resulting from unfair labor practices". *Labor Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. C. A.

[13] Of the forty-one state agencies (including the District of Columbia) which have expressed their views, some thirty-four have ruled that "back pay" is not "wages": Ala., Calif., Ariz., Conn., D. C., Fla., Ill., Ind., Iowa, Kan., Ky. (semble), La. (semble), Me., Md., Minn., Miss., Mo., Neb., N. H., N. M., N. C., Ohio, Okla., Ore. (semble), Pa., R. I., S. C., S. D., Tenn., Utah, Wash., W. Va., Wisc., Wyo. *Contra:* Ga., Mont., Nev., N. J., N. Y., N. D., Va. See C. C. H. Unemployment Insurance Service, State Series, Sec. 1201, and "New Matters."

3), certiorari denied, 314 U. S. 693; *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362; *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, 543; *Agwilines, Inc.* v. *Labor Board*, 87 F. 2d 146 (C. C. A. 5). As this Court succinctly stated in the *Virginia Electric* case, when sustaining the power of the Board to order reimbursement of amounts checked off as dues to a company union (p. 543):

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. Cf. *Agwilines, Inc.* v. *Labor Board*, 87 F. 2nd 146, 150–151; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177.

Since the "back pay" remedy vindicates public and not private rights, its award is entirely discretionary with the Labor Board. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 198. Moreover, the employee is bound by the determination of the Board; he cannot institute proceedings to

enforce the Board's order or the court's decree entered upon the Board's petition; nor can he bargain away benefits given him by the order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *Stewart Die Casting Corp.* v. *Labor Board*, 132 F. 2d 801 (C. C. A. 7); *Labor Board* v. *American Potash & Chemical Corp.*, 113 F. 2d 232 (C. C. A. 9); *Waterman S. S. Corp.* v. *Labor Board*, 119 F. 2d 760 (C. C. A. 5).[14] While it is true that the Board usually endeavors to make "the workers whole for losses suffered", that is done only as "part of the vindication of the public policy which the Board enforces". *Phelps Dodge Corp.* v. *Labor Board, supra*, at p. 197. The Board primarily is seeking a "remedy" for the conditions created by the unfair labor practice (*Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 236); although its order may involve "compensation for the employee, [that] is not in itself a motivating factor, but merely a consequence incidental to the ideal of carrying out the purposes of the Act". (1939) 48 Yale L. J. 1265.

Accordingly, in fashioning a "back pay" order, the Board may give weight to factors which, although bearing upon the purposes of the Act, reduce the extent of the reparation to the employee for his loss. Thus, in view of "the healthy

[14] Prior to actual receipt of the money, the employee has no property in the award and an assignment or attachment by creditors is ineffective. *Labor Board* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3); *Labor Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C. C. A. 9).

policy of promoting production and employment", the Board may deduct losses which the employee incurred by "unjustifiable refusal to take desirable new employment". *Phelps Dodge Corp.* v *Labor Board,* 313 U. S. 177, 200. Again, delay in filing charges before the Board may be made the basis of a deduction for the period of the delay (*Matter of C. G. Conn, Ltd.,* 10 N. L. R. B. 498), and if a favorable ruling by the trial examiner is reversed by the Board, no "back pay" is ordered for the period when the examiner's report stood unreversed (*Matter of E. R. Haffelfinger Co.,* 1 N. L. R. B. 760). The Board has refused to award "back pay" where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract (*Matter of McKesson & Robbins, Inc.,* 19 N. L. R. B. 778), or where the employee had been guilty of serious misconduct during a strike (*Matter of Mt. Clemens Pottery Co.,* 46 N. L. R. B. 714). Whatever compensation the employee receives, therefore, may be considerably less than his loss in pay, and may be dictated by considerations far removed from the service he would have performed, much less from "service performed".[15]

[15] The practices of the Board in awarding "back pay" are succinctly summarized in *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 198, fn. 7. See also: (1939) 48 Yale L. J. 1265; Annual Reports of the Board, First, p. 129 *et seq.;* Second, p. 150 *et seq.;* Third, p. 200 *et seq.;* Fourth, p. 97 *et seq.;* Fifth, p. 74 *et seq.;* Sixth, p. 75 *et seq.;* Seventh, p. 52; Eighth, p. 40 *et seq.,* Ninth, p. 48 *et seq.*

It is true that several courts have held "back pay" to be "wages", for purposes other than Old Age and Survivors Insurance Benefits. Thus, a divided court has held that "back pay" constitutes "wages" within the meaning of the priority provisions of the Bankruptcy Act.[18] *Labor Board* v. *Killoren*, 122 F. 2d 609 (C. C. A. 8), certiorari denied, 314 U. S. 696. "Back pay" also has been held to be "income derived from * * * wages, or compensation for personal service" within the meaning of Section 22 (a) of the Internal Revenue Code. *Manseau* v. *United States*, 52 F. Supp. 395 (D. Mich.). And in New York, "back pay" has been treated as "wages" for purposes of the State Unemployment Insurance Law. *Tonra* v. *Robins Dry Dock & Repair Co.*, 258 App. Div. 835, 15 N. Y. Supp. 2d 755 (memorandum opinion), affirmed without opinion, 283 N. Y. 676, 28 N. E. 2d 402; *McCoy* v. *Remington Rand Inc.*, 262 App.

[18] Sec. 64a (2) of the Bankruptcy Act accords second priority to "wages * * * earned * * * due to workmen * * *." 11 U. S. C. 104a (2). In the *Killoren* case, the issue before the court was whether, as against creditors, the claims for "back pay" would be given the three months' priority given in bankruptcy proceedings to wage claimants or the preference, unlimited as to time, for debts due to the United States. 11 U. S. C., Sec. 104 (a) (2), (5). To avoid preferential or discriminatory treatment and to achieve equality with other workers' claims, the court, in a split decision, assimilated the claim presented by the Labor Board to one for "wages." In rejecting the Labor Board's contention that the priority should be for a debt owed the United States, the case clearly is no authority for the proposition that "back pay" constitutes remuneration for service performed.

Div. 790, 27 N. Y. Supp. 2d 298 (memorandum opinion). Both the *Killoren* and *Manseau* cases clearly are inapplicable here, for they involved statutes which were completely devoid of a definition of "wages." The decisions under the New York Unemployment Insurance Law seem equally inapplicable, since they involved a statutory definition of wages different from that contained in the Social Security Act; and, in any event, the cases are of doubtful persuasiveness since they are only memorandum opinions, without disclosure of the basis for the position taken."

4. THE PURPOSES OF THE SOCIAL SECURITY AND THE NATIONAL LABOR RELATIONS ACTS.

Although the interpretation of the Social Security Act as excluding "back pay" is supported by the statutory language and by the consistent administrative practice of the Bureau of Internal Revenue and the Social Security Board, we do not wish to imply that such a construction will tend to further the objectives of the Social Security Act or the National Labor Relations Act. In its minutes of March 27, 1942 (Appendix D, *infra*, p. 37), the Social Security Board agreed "as to the desirability of amending the statute to pro-

[11] The New York Unemployment Compensation Law defines "wages" as "remuneration" paid "with respect to employment;" and the word "employment" is defined as "any employment under any contract of hire," "express or implied, written or oral." Sec. 502 of New York Labor Law, Thompson's Consol. Laws N. Y., Chap. 31, Art. 18.

vide for inclusion as 'wages' of payments of back pay."

It is, of course, a matter of common knowledge that the Social Security Act, insofar as its old age insurance benefits are concerned, has a "great humanitarian purpose" (R. 43) and was intended to relieve or mitigate the want which experience had shown was the common lot of the majority of workers who reached the age of sixty-five. H. Rep. No. 728, 76th Cong., 1st Sess., pp. 3–4; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 3–4. "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis*, 301 U. S. 619, 641.

We believe that this policy would be advanced if workers are not deprived of some of their old-age protection because they are the victims of unlawful employer practices; if in fact the employer is required to make them whole financially there is no persuasive reason of policy why the amount paid them should not be treated as wages for Social Security purposes.

Consideration of the purposes of the National Labor Relations Act leads to the same conclusion. For, under the Labor Act, the "back pay" order in one aspect has been conceived to be a device for "making whole" unlawfully discharged employees. Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7; *Third Annual Report of the National*

Labor Relations Board, p. 200. This objection would be partially frustrated if "back pay" were not classified as "wages" under the Social Security Act, since the employee would be denied certain Social Security benefits he would have enjoyed but for his unlawful discharge. The court below observed (R. 60), this would mean that "rights, the exercise of which it is national policy to encourage, may be exercised only at the peril of surrendering rights under other social legislation created for the protection of the same persons."

We think it appropriate for the Court to give consideration to the objectives of both the Social Security and the Labor Relations acts. But in the absence of some showing of congressional intention on the point here in question [18] we are forced to the conclusion that the over-all or general purposes of the two statutes do not manifest legislative intention on this issue clearly enough to warrant rejection of the ordinary meaning of the specific language of the statutory definition. The language of a law is itself the strongest indication of purpose

[18] We have not been able to find in the legislative history of the Social Security Act any specific reference to "back pay." The Labor Relations Act itself, which gave rise to "back pay," was enacted on July 5, 1935, less than two months prior to the adoption of the Social Security Act. Congress probably did not consider the specific problem nor even have any awareness of its existence. The Social Security Act was experimental in a number of its features and it was intended that it would be changed from time to time to take care of any deficiencies which experience might disclose therein. H. Rep. No. 728, pp. 4–5; S. Rep. No. 734, p. 4, both *supra*.

on a particular point. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 543. Although a different result might be more in harmony with the statutory objectives, the literal interpretation of the Act does not produce an absurd result. While we do not believe the administrative difficulty in classifying "back pay" as "wages" to be insuperable, it is not inconceivable that Congress might have thought this a reasonable basis for not making an exception to the general definition.

We accordingly conclude that the Social Security Board did not err in giving the statutory definition a literal construction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
JOSEPH B. GOLDMAN,
Attorneys.

DECEMBER 1945.

APPENDIX A

STATUTES INVOLVED

1. Title II of the Social Security Act (49 Stat. 622, as amended, 53 Stat. 1360, 42 U. S. C. Sec. 401 *et seq.*) provides in part as follows:

> SEC. 203. *Reduction and increase of insurance benefits.* * * *
>
> (d) Deductions, in such amounts and at such time or times as the Board shall determine, shall be made from any payment or payments under this title to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits for any month in which such individual:
>
> (1) rendered services for wages of not less than $15; or
>
> * * * * * *
>
> SEC. 209. *Definitions.*
>
> When used in this title—
>
> (a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *
>
> (b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed

after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed or in connection with a vessel not an American vessel by an employee, if the employee is employed on and in connection with such vessel when outside the United States;

(6) Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1410 of the Internal Revenue Code by virtue of any other provision of law;

(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under

the Constitution of the United States from the tax imposed by section 1410 of the Internal Revenue Code;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; * * *.

* * * * *

(e) The term "primary insurance benefit" means an amount equal to the sum of the following—

(1) (A) 40 per centum of the amount of an individual's average monthly wage if such average monthly wage does not exceed $50, or (B) if such average monthly wage exceeds $50, 40 per centum of $50, plus 10 per centum of the amount by which such average monthly wage exceeds $50 and does not exceed $250, and

(2) an amount equal to 1 per centum of the amount computed under paragraph (1) multiplied by the number of years in which $200 or more of wages were paid to such individual. Where the primary insurance benefit thus computed is less than $10, such benefit shall be $10.

* * * * *

(g) The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (h) of this section, the term "quarter" and the term "calendar quarter" mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term "quarter of coverage" means a calendar quarter in which the individual has been paid not less than $50 in wages. * * *

* * * * *

2. The National Labor Relations Act (49 Stat. 449; 29 U. S. C. Sec. 151 *et seq.*) provides in part as follows:

SEC. 2. *Definitions.*

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the do-

mestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 10 (c). * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

APPENDIX B

INTERNAL REVENUE INTERPRETATION

S. S. T. 359, 1939-1 Cum. Bull. 305 of the Bureau of Internal Revenue, reads in part as follows:

> Advice is requested whether payments made to employees of the M Company, who had been discharged and who were reinstated pursuant to an order issued by the National Labor Relations Board, constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.
>
> * * * * * *
>
> As indicated above, for purposes of the National Labor Relations Act, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment". However, it does not follow that the sum of money paid to that individual upon reinstatement pursuant to an order of the Board constitutes *remuneration for services performed by an employee for his employer* for the purpose of the taxing provisions of the Social Security Act. Such employee has actually performed no services for which such payments are made, and the employer has done all within his power to terminate the employment relation, at least temporarily.

Furthermore, the individual has no right to demand any compensation from the employer for that period, and it is within the discretion of the Board to decide whether reinstatement shall be with or without back pay, depending on the circumstances in the particular case.

* * * * *

It is held that the payments in question made to employees of the M Company do not constitute *remuneration for services performed by an employee for his employer,* but are payments to the employees on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services to the M Company. Accordingly, such payments do not constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

APPENDIX C

LETTER FROM SOCIAL SECURITY BOARD

FEDERAL SECURITY AGENCY,
WASHINGTON, *August 8, 1945.*

SOLICITOR GENERAL OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

Re: *Joseph Nierotko* v. *Social Security Board* (United States Circuit Court of Appeals, Sixth Circuit, Civil No. 9896).

DEAR SIR: Reference is made to the opinion of the Circuit Court of Appeals in the above-entitled case in which it has been held that back pay awarded to an employee by the National Labor Relations Board constitutes "wages" within the meaning of the Social Security Act. We have been informed that in preparing your brief for application for writ of certiorari with the Supreme Court of the United States, you have been disturbed by the statement in the opinion, "That such difficulties are not insuperable [administrative difficulties in treating back pay as current wages during the period of unlawful discharge] is demonstrated by its [the Board's] practice in crediting to the employee the differential between wages paid and the legal minimum under the Fair Labor Standards Act when payment is made in pursuance of an administrative order or a court

decree." You have inquired to ascertain how, in fact, the Social Security Board does credit such payments to the wage record of an employee.

We wish to point out, first, that payments ordered by the Wage and Hour Division of the Department of Labor represent the difference between wages paid by an employer for services rendered and the legal minimum wage payable under the Fair Labor Standards Act for services rendered. In considering such payments as "wages" the Social Security Board has always recognized that they are granted as remuneration for service and hence fall within the definition of "wages" in section 209 (a) of the Social Security Act, as amended.

Although such payments are "wages," the Social Security Board has not credited them to the wage records of the employees in the manner suggested by the court in its opinion. They are not credited to the periods for which they are paid or in which the services were performed. Under the provision of section 209 (g) of the Social Security Act, as amended, a quarter of coverage is a calendar quarter during which "wages" of not less than $50 are paid. Under the present terms of the Act, these payments are considered to be wages paid at the time when the employer actually pays over the money pursuant to administrative order or court decree.

We deem it advisable, however, to call to your attention that for purposes of deductions from benefit payments to beneficiaries, wage payments ordered pursuant to the provisions of the Fair Labor Standards Act will cause deduction for the

month in which the beneficiary rendered services when the bonus payment, together with amounts received for such services in that month, are equal to wages of more than $14.99. If the amount paid in any such month, together with the back wages allocable thereto, is in excess of $14.99, deductions under either section 203 (d) or section 203 (e) of the Social Security Act, as amended, are required. Allocation in this instance is necessitated by the language of the Act which reads: "* * * for any month in which such individual: (1) rendered services for wages of not less than $15; * * *."

We trust that this information will be of assistance to you.

Sincerely yours,

JACK B. TATE,
General Counsel.

APPENDIX D

SOCIAL SECURITY BOARD MINUTES

NOVEMBER 26, 1945.

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code, I hereby certify that the following is a true copy of the minutes of proceedings at a meeting of the Social Security Board on March 27, 1942, regarding Payments of Back Pay Made Under the National and State Labor Relations Acts, Federal and State Wage Laws, and Union Agreements in Relation to Unemployment Compensation:

> Pursuant to Board action of January 16, 1942, page 11441, paragraph 6, the Board again considered the questions presented in the memoranda from Mr. Pogge dated December 26, 1941, "Payments of Back Pay Made Under the National Labor Relations Act" and from Mr. Corson dated January 12, 1942, "Payments of Back Pay Made Under the National and State Labor Relations Acts, Federal and State Wage Laws, and Union Agreements in Relation to Unemployment Compensation" (Document No. 5663–e). The Board determined that such payments of back pay cannot be considered as constituting "wages" within the meaning of Section 1607 (b) of the Unemployment Tax Act, and Sections 209 (a) and 209 (h)

of the Social Security Act as now written. Mr. Altmeyer dissented on the grounds that law and equity require that such payments be considered as constituting wages.

The Board agreed as to the desirability of amending the statute to provide for inclusion as "wages" of payments of back pay with respect to the above-mentioned Sections, and also to provide, for purposes of Section 209 (g), retroactive credit for quarters of coverage during the period covered by the back pay allowance. The Bureaus of Employment Security and Old-Age and Survivors Insurance and the Office of the General Counsel were instructed to develop proposed amendatory language for the Board to consider in connection with over-all substantive amendments to the Social Security Act.

The original record of said minutes is now on file in the Federal Security Agency.

In witness whereof, I have hereunto set my hand and caused the seal of the Federal Security Agency to be affixed on the day and year first above written.

By direction of the Federal Security Administrator.

[SEAL]

[S] M. COLLINS,
Assistant Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1949